

From: [Bradshaw, Kelly](#)
To: [Flynn, Mark](#)
Subject: FW: PRIVILEGED: Post-Emergency Law Reform Proposals
Date: February 22, 2022 4:33:00 PM

For your SA. I know you are interested in this stuff.

KB

From: Manarin, Karen Manarin <Karen.Manarin@rcmp-grc.gc.ca>
Sent: February 22, 2022 3:49 PM
To: John Ahern **Personal Info.** Bradshaw, Kelly <K.Bradshaw@rcmp-grc.gc.ca>; Beaudoin, Denis <denis.beaudoin@rcmp-grc.gc.ca>
Subject: RE: PRIVILEGED: Post-Emergency Law Reform Proposals

Good afternoon.

Further to John's email below, I am adding my thoughts on the topic of **Compelling Interviews with Gatekeepers to the Financial System** and the potential opportunity, as noted by John below to "fix some legislation that has created obstacles for financial crime investigations and prosecutions for many years."

Canada should consider an investigative summons authority that would permit police, subject to appropriate safeguards, to compel third party witnesses to answer questions to assist in the investigation of a criminal offence.

There is generally no applicable constitutional right to silence in Canada for a third party that would preclude compelling them to give statements to police. In fact, it is not unusual for these third parties to request that the police compel them so that they are not seen to be voluntarily providing information to the police. This is very different from the right of subjects of a criminal investigation not to speak with the police which is constitutionally protected.

Over the course of the last 15 years, there has been discussions with regards to whether a broad investigative summons power should be introduced into Canadian law. As noted by John below, police agencies in Canada have expressed concern that key third party players involved in sophisticated capital market factual scenarios will not cooperate with an ongoing police investigation. The employees of corporations, securities dealers, accountants or others with knowledge of relevant facts, are frequently directed not to speak to police investigators or choose not to do so for their own reasons. The lack of assistance from potential witnesses, especially professionals who serve as the gatekeepers, at the investigative stage presents a major obstacle to the timely and thorough investigation of the business activities of an organization, and to the identification of areas that warrant further investigation or prosecution.

Other democratic countries have a number of investigative and prosecutorial tools that facilitate the gathering of evidence from recalcitrant witnesses but there are no similar tools which are currently available to Canadian law enforcement authorities. It is significant that Canadian investigators have

more limited tools available to them especially since the perception that Canadian securities fraud enforcement is less effective is often made by comparing Canadian investigations with the results in jurisdictions such as the United States, where there are tools available to police to compel third party witnesses.

Please do not hesitate to let me know if you have any questions or require any further information.

Regards,

Karen

From: John Ahern Personal Info.
Sent: February 21, 2022 12:01 AM
To: Bradshaw, Kelly <K.Bradshaw@rcmp-grc.gc.ca>; Beaudoin, Denis <denis.beaudoin@rcmp-grc.gc.ca>
Cc: Manarin, Karen Manarin <Karen.Manarin@rcmp-grc.gc.ca>
Subject: PRIVILEGED: Post-Emergency Law Reform Proposals

PRIVILEGED AND CONFIDENTIAL

Hi Kelly and Denis:

Introduction

I understand that consideration is being given to law reform which will make some of the current emergency economic measures permanent. While the political arm of government is in such a positive frame of mind, this may be a good time to pursue reform of some of the provisions of the Criminal Code and the PCMLTFA that have been giving us problems in the criminal investigation and prosecution world. Traditionally it seems like there is a lot of resistance to amending the law but a reformist window may open for a while. So here are a few initial thoughts.

Designated Persons

In my email to Denis yesterday, I mentioned the need for a system to identify designated persons, the criteria by which someone would be identified as a designated person (***including RCMP input***), the need to list them in regulations or schedules to regulations, and finally a system by which a designated person can apply to have their status reviewed and potentially vacated.

SEMA may offer a good model for this, even though it deals with designated foreign entities rather than domestic entities.

Here is something to think about. Could the designated person criteria include not only political extremists but also habitual financial criminals like prolific capital market manipulators, lawyers heavily involved in laundering offshore fraud proceeds, PMLs, and the other kinds of financial

criminals we typically deal with? They are very hard to prosecute. So this may be one avenue for disrupting them that is more effective because the hurdle is not so high – much like civil forfeiture which is so much easier than criminal forfeiture.

Duties re Dealings with a Designated Person and Mandatory Reporting

Presumably the new legal provisions would refine those currently set out in SOR 2022–22, section 2 (duty to cease dealings), 3 (duty to determine), and some form of the various duties to report and disclose set out in sections 3, 4 and 5.

By and large these look like they would fit into the PCMLTFA, unless the intention is to create a new standalone statute.

In my email to Denis yesterday, I suggested that any mandatory reporting would best be done to FINTRAC rather than to the Force or to CSIS since FINTRAC, as Canada's FIU, is set up to receive, analyze and distribute financial intelligence. However, if the decision is that there will be a duty to report to the RCMP, I think we will need a substantial budget allotment for that – the volume of data, the necessary equipment and software, and the training and specialized personnel required would be appreciable.

Seizure and Forfeiture

The Mayor of Ottawa suggests forfeiture of offenders' seized vehicles to defray the costs of removing them from Wellington St. and the many other costs of clearing the area. You can read some of this into section 10 of SOR 2022–21. But in permanent legislation there will have to be something much more elaborate. To be frank, I have not yet found a body of law that would support what the Mayor is suggesting. I assume he has had some legal advice that it would be viable, but it must involve cobbling together a number of unrelated laws and/or regulations in a creative manner.

On the plus side, I think this may offer an opportunity to expand and improve the law of criminal seizure and forfeiture, which is currently in crisis in my view.

Currently we have criminal forfeiture under Part XII.2 of the Criminal Code and civil forfeiture statutes in various provinces. Over the past 10 years civil forfeiture has gradually been displacing criminal forfeiture. The criminal process is much more cumbersome than civil forfeiture which must have been designed, in part, to avoid the pitfalls we have found in using Part XX.2.

Criminal forfeiture can only occur after a conviction for an indictable offence. In Fairy Creek, one of E Division's current eco-activist files, the BCPS has only approved three charges out of 159 recommended charges, and they wouldn't prosecute anybody at all in another such case, the CN Rail case. Thus, if we were to seize vehicles, a helicopter which has been delivering supplies to remote areas in Fairy Creek, equipment from staging areas, and so on, we would likely have to return it all because the BCPS has no appetite for approving indictable charges, let alone seeing charges through to conviction and then seeking forfeiture. So that is a dead end at present.

There is one narrow avenue for non-conviction-based criminal forfeiture, found in section 490(9) of the Criminal Code. It is quicker and easier than Part XII.2 forfeiture but still requires more time and resources than civil forfeiture and has a less certain outcome. I did a few when I was a prosecutor and can elaborate on this if you would like me to. For example, I did a case in which a traffic member in Revelstoke stopped a car with four drug couriers running a trunk full of cash from Vancouver to Calgary. I think it is only useable in simple cases like that.

The point is that this may be an opportunity to create much more streamlined criminal seizure and forfeiture provisions, in the Criminal Code or perhaps the PCMLTFA. Perhaps those might even extend beyond the assets of designated persons to other types of criminal assets. A real aspiration would be to expand the availability of non-conviction based forfeiture in the Criminal Code and do a significant re-drafting of Part XII.2 so that it is more workable.

Compelling Interviews with Gatekeepers to the Financial System

An obstacle to a lot of financial criminal investigations is that gatekeepers to the financial system will not talk to us. Over the past four years we have run into this a few times with accountants and securities dealers. It's almost impossible to get a lawyer to give you an interview.

In contrast, the securities commissions have powers of compulsion and these people have no choice other than to answer questions and provide documents.

Some years ago my predecessor, Mike Watson, wrote up a proposal for creating powers of compulsion for certain gatekeepers as witnesses in criminal investigations. I understand that all of the interested agencies were on board and then Justice Canada put a spike in it. Karen Manarin and I have discussed this several times and I think it's fair to say we're both of the view that this would be a very unusual provision in the criminal law. But perhaps the current situation provides us with an opportunity to revisit the issue. It may not be as much of a stretch as it was last time around since the current proposal is in part about expanding the compulsory reporting of financial intelligence. So it is only a small step from that to enacting some form of compulsory police interviews and perhaps some compulsory document production.

I am copying Karen on this email as she knows much more about this issue than I do and may wish to chime in.

Conclusion

Those are just a few initial thoughts. I'm sure that we will collectively come up with many more ideas as the process unfolds. I do think that this offers us an opportunity to fix some legislation that has created obstacles for financial crime investigations and prosecutions for many years.

All the best,

John

John N. Ahern

**RCMP National Special Advisor
Financial Crime Investigations**

14200 Green Timbers Way, Mailstop #809
Surrey, BC V3T 6P3

Phone: 778-290-4386

Personal Info.

Email: john.ahern@rcmp-grc.gc.ca

**Senior Legal Counsel, Blue Sky Law
John N. Ahern Law Corporation**

Personal Info.

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